FILED
DEC 20 1991
OFFICE OF THE CLERK

No. 91-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,
v.
THERESE A. BURKE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
THE COURT OF APPEALS CORRECTLY RULED THAT TITLE VII CLAIMS ARE FOR PERSONAL INJURIES AND THUS MONETARY SETTLEMENTS FOR SUCH CLAIMS ARE EXEMPT FROM TAXATION UNDER THE EXEMPTION FOUND IN SECTION 104(a)(2) OF THE INTERNAL REVENUE CODE	8
A. This Court's Decisions in *Lukens Steel* and *Wilson* Held That Civil Rights Statutes (Sections 1981 and 1983) Protect Personal Injuries That Are Characterized as Statutory Torts	8
B. Like Sections 1981 and 1983, Title VII Claims Involve Personal Injury Actions Exempt From the I.R.C.	13
C. Potential Substantive Conflicts Between Title VII and Section 1981 Have Been Resolved in Favor of the Substantive Requirements and Protections of Title VII	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 17, 19
Brady v. *Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972) 17
Burke v. United States, 929 F.2d 1119 (6th Cir. 1991), *cert. granted*, No. 91-42 ..... 5, 13
Byrne v. Commissioner, 883 F.2d 211 (3d Cir. 1989) 9, 12
Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied, reh'g denied*, 434 U.S. 881 (1977) 20
Curtis v. Loether, 415 U.S. 189 (1974) 5, 12
Davis v. Passman, 442 U.S. 228 (1979) 5, 12
Delta Air Lines v. August, 450 U.S. 346 (1981) 3
Driscoll v. Jefferson, 11 Fair Empl. Prac. Cas. (BNA) 308 (E.D. Mich. 1975) 20
Espinoza v. Farah Mfg. Co., 11 Fair Empl. Prac. Cas. (BNA) 696 (W.D. Tex. 1975) 18
Evans v. Jeff D., 475 U.S. 717 (1986) 3
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 14, 15
Gairola v. Department of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985) 16
General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 4
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) ..... *passim*
Great Amer. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 3-4
Hinton v. Lee Way Motor Freight, Inc., 412 F. Supp. 625 (W.D. Okla. 1975) 20
Huebschen v. Department of Health & Social Servs., 716 F.2d 1167 (7th Cir. 1983) 16
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 3, 21
Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971) 18

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 7, 13, 14
Lewis v. Central Piedmont Community College, 689 F.2d 1207 (4th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) 16
Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984) 16
Lincoln v. Board of Regents of the Univ. Sys. of Ga., 697 F.2d 928 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) 16
Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990) 3
Marek v. Chesney, 473 U.S. 1 (1985) 3
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15
New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) 15
Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976) 18, 20
Patterson v. McLean Credit Corp., 109 S. Ct. 2363 (1989) 3, 7, 14, 15
Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990) 8, 13
Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) 3, 6, 12
Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990) 8
Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982) 16
Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975), *cert. granted, decision vacated, case remanded*, 431 U.S. 951 (1977) 21
Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970), *reh'g denied*, 431 F.2d 1097, *cert. denied*, 401 U.S. 948 (1971) 17

TABLE OF AUTHORITIES—Continued

	Page
Setser v. Novak Investment Company, 657 F.2d 962 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981)	21
Shield Club v. City of Cleveland, 13 Fair Empl. Prac. Cas. (BNA) 533 (N.D. Ohio 1974)	18
Terrell v. United States Pipe & Foundry Co., 6 Fair Empl. Prac. Cas. (BNA) 1027 (N.D. Ala. 1973)	18
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	14
United States v. East Tex. Motor Freight Sys., 564 F.2d 179 (5th Cir. 1977)	4, 21
United States v. Trucking Management, Inc., 662 F.2d 36 (D.C. Cir. 1981)	4
Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976)	18
Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980)	16
Wilson v. Garcia, 471 U.S. 261 (1985)	5, 6, 8, 9

STATUTES

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*	2
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000 *et seq.*	2
§ 703(h)	18
Internal Revenue Code, 26 U.S.C. § 104(a)(2)	*passim*
42 U.S.C. § 1981	2

FEDERAL REGULATIONS

Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *as amended by* 32 Fed. Reg. 14,302 (1967)	2

OTHER AUTHORITIES

Brief for the United States, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)	7, 13, 14

TABLE OF AUTHORITIES—Continued

	Page
Brief for the United States, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989)	14, 15

MISCELLANEOUS

Comment, *Arbitral Deference and the Right to Make and Enforce Contracts under 42 U.S.C. § 1981*, 82 N.W. U.L. Rev. 109 (1987)	10
Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. Cal. L. Rev. 961 (1977)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-42

UNITED STATES OF AMERICA,
Petitioner,

v.

THERESE A. BURKE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* in support of the respondent pursuant to Supreme Court Rule 37. Letters of consent of the Solicitor General and the respondent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a nationwide association of employers and trade associations, organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250

major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to various equal employment laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, 42 U.S.C. § 1981, Executive Order 11,246 (30 Fed. Reg. 12,319 (1965), *as amended by* 32 Fed. Reg. 14,302 (1967)), and other federal, state and local statutes, orders and regulations prohibiting employment discrimination. As respondents in discrimination proceedings, many of EEAC's members will be involved in monetary settlements and remedial orders involving employment discrimination claims, charges and lawsuits.

Thus, EEAC's members have a direct interest in the issue presented here: whether payments received by an individual in settlement of a Title VII claim are excludable from the individual's gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received . . . on account of personal injuries." Indeed, the potential impact of this case extends beyond Title VII. The Solicitor General's petition "agree[s] with the court of appeals that there is no valid basis for distinguishing the tax

treatment of back pay under Title VII and under the ADEA." Pet. at 17.[1]

The Court's decision will have a direct and substantial impact on the ability of parties to settle employment discrimination claims, as the degree of tax liability has an absolute bearing on the amount of settlement or monetary relief that an individual will take home after tax liability has been calculated. Moreover, to the extent that the government now is refusing to settle employment discrimination cases unless taxes are deducted from the settlement amount, there is a disparity in settlement practices between cases involving the government and those settled by private entities.

The issues presented here require comparisons between the antidiscrimination and remedial schemes of the various statutes at issue in this case, and in other cases involving settlement of such claims. EEAC has been involved as *amicus curiae* in numerous cases involving those statutes. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (state *tort* statute of limitations applies to claims under 42 U.S.C. § 1981); *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331 (1990) (court's Title VII determination did not stop right to Section 1981 jury trial on same issue); *Patterson v. McLean Credit Corp.*, 109 S. Ct. 2363 (1989); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Delta Air Lines v. August*, 450 U.S. 346 (1981) (Rule 68); *Marek v. Chesney*, 473 U.S. 1 (1985) (Rule 68); *Great Am. Fed. Sav. & Loan*

[1] "Pet." references are to the petition for a writ of certiorari filed by the Solicitor General in this Case.

Ass'n v. Novotny, 442 U.S. 366 (1979) (comparison of Title VII and 42 U.S.C. § 1985(3); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981 requires proof of intentional discrimination); *United States v. East Tex. Motor Freight Sys.*, 564 F.2d 179 (5th Cir. 1977) (applied Title VII seniority standards to Executive Order 11246); and *United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981) (same).

Accordingly, because of its past experience with these issues, EEAC is well qualified to brief the Court in this case. EEAC's brief will be directed toward arguing that Title VII claims are personal injury claims, thus falling within the Section 104(a)(2) exemption. *Cf. Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

STATEMENT OF THE CASE

This case involves the issue of whether monetary amounts received in settlement of a Title VII sex discrimination action are excludable from taxable income. Section 104(a)(2) of the Internal Revenue Code provides:

> (a) *In general.*—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, *gross income does not include*— . . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of *personal injuries* or sickness . . .

26 U.S.C. § 104(a)(2) (emphasis added).

The taxpayers herein brought this action seeking refunds of federal income and social security taxes

withheld from payments received from their employer in settlement of a Title VII sex discrimination action. The Sixth Circuit examined "the nature of the injury to determine whether the injury and claim are tort-like in nature, and not whether the consequences of the injury resulted in an award of compensatory damages or damages for back pay." *Burke v. United States*, 929 F.2d 1119, 1121 (6th Cir. 1991), *cert. granted*, No. 91-42.

The Sixth Circuit held that the monetary settlement here was for "personal injury" and thus exempt from taxation under Section 104(a)(2). The court stated that:

> "[c]ourts have long held that injuries resulting from invidious discrimination, be it on the basis of race, sex, national origin or some other unlawful category, are injuries to the individual rights and dignity of the person. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1986) (race discrimination, challenged under § 1981, is a fundamental injury to the individual rights of the person; *cf. Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (analogizing a violation of the Civil Rights Acts of 1871 to a violation of the fourteenth amendment which sounds in tort as an injury to the person); *Curtis v. Loether*, 415 U.S. 189, 195-96 n. 10 (1974) (analogizing racial discrimination to a "dignitary tort."). This long-held view of the tort-like nature of the injury resulting from unlawful discrimination has led this court and others to the conclusion that damages resulting from an action for unlawful discrimination are "damages on account of personal injury" for the purposes of § 104(a)(2).

929 F.2d at 1121-22. (citations omitted) Based on this reasoning, the Sixth Circuit held that the with-

holding of federal taxes from the Title VII settlement damages giving rise to this taxpayer action was improper. 929 F.2d at 1124.

This *amicus curiae* brief addresses in more detail the case and statutory authority holding that the personal injury nature of claims brought under 42 U.S.C. §§ 1981 and 1983 is equally applicable to Title VII claims.

SUMMARY OF ARGUMENT

The court below correctly ruled that monetary settlements of Title VII claims are "on account of personal injuries" and thus exempt from taxation under the exemption found in Section 104(a)(2) of the Internal Revenue Code. Numerous courts have agreed that this exemption does not lose its force even if the injury involves back pay, as the nature of the injury is tort-like in nature, whatever the form of injury resulting from alleged violation.

This Court repeatedly has held that the rights protected by the civil rights statutes are personal in nature. For example, *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Goodman v. Lukens Steel Co.*, 471 U.S. 261 (1987) held that state tort statutes of limitations apply to suits brought under 42 U.S.C. §§ 1981 and 1983. The Court rejected assertions that discrimination claims essentially are contractual in nature, and instead found that these statutes protect against conduct that involves "a fundamental injury to the individual rights of a person." *Lukens Steel*, 482 U.S. at 661-62. Likewise, Title VII involves a statutory employment "tort" that is "contrary to public policy and harmful to society as a whole." *Price*

Waterhouse v. Hopkins, 109 S. Ct. 1775, 1798 (1989) (O'Connor, J., concurring).

Universally, court decisions have construed Title VII and Section 1981 as providing identical causes of actions on issues where their substantive provisions both apply. Indeed, in its *amicus curiae* brief in *Johnson v. Railway Express Agency Inc.*, the Solicitor General argued that "claims of racially discriminatory employment practices under Section 1981 and Title VII are essentially equivalent in substance." Brief at 21. Thus, the government's unexplained assertions that *Lukens Steel* and *Wilson* "shed[] no light" on the issues in the instant case (Brief of the United States at 29) need be given no weight.

In *Patterson v. McLean Credit*, 109 S. Ct. 2363, 2377-78, 2393, both the majority and dissenting opinions stated that Title VII's burden of proof scheme should be used to examine the Section 1981 promotion discrimination issue before the Court. In addition, a large body of lower court opinions has ruled consistently that the causes of action under Title VII and Sections 1981 and 1983 are virtually identical. Indeed, it is quite common for plaintiffs to challenge the same practices under both Section 1981 and Title VII and for these issues to be treated as identical by the courts.

Moreover, the courts universally have rejected arguments that Section 1981 affords more protections than Title VII because Section 1981 does not have Title VII's specific limitations, such as requiring a showing of intentional discrimination to attack an otherwise bona fide seniority system.

Given the identical "personal" nature of claims under Title VII and Section 1981, the Court should

affirm the Sixth Circuit's reliance on *Wilson* and *Lukens Steel* as a basis for ruling that monetary amounts received under Title VII are "damages on account of personal injury" for the purposes of § 104(a)(2)'s exemption from personal income taxes.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT TITLE VII CLAIMS ARE FOR PERSONAL INJURIES AND THUS MONETARY SETTLEMENTS FOR SUCH CLAIMS ARE EXEMPT FROM TAXATION UNDER THE EXEMPTION FOUND IN SECTION 104(a)(2) OF THE INTERNAL REVENUE CODE

A. This Court's Decisions in *Lukens Steel* and *Wilson* Held That Civil Rights Statutes (Sections 1981 and 1983) Protect Personal Injuries That Are Characterized as Statutory Torts

The Sixth Circuit's decision below and other decisions have relied upon this Court's decisions in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), and *Wilson v. Garcia*, 471 U.S. 261 (1985), in holding that Title VII and ADEA claims are exempt from federal income taxes.[2] For the reasons set forth below, the government is plainly incorrect in its unexplained assertion that these decisions "shed[] no light on the proper interpretation of Section 104(a)(2) of the Internal Revenue Code." (Brief for the United States at 29.) *Wilson*, *Lukens Steel* and other related decisions provide direct support for the Sixth Circuit's holding that Title VII monetary settlements are exempt as amounts of damages received "on account of personal injuries" under Section 104(a)(2).

[2] *See e.g.*, *Rickel v. Commissioner*, 900 F.2d 655, 662-63 (3rd Cir. 1990) (ADEA); *Pistillo v. Commissioner*, 912 F.2d 145, 149 (6th Cir. 1990) (ADEA).

Prevailing decisions have established that violations of federal statutory rights are "a personal injury tort or tort type right, rather than for an economic right arising out of contract." *Byrne v. Commissioner*, 883 F.2d 211, 215 (3d Cir. 1989).

> Lawsuits brought under these statutes allege violations of a duty owed the plaintiff by the defendant employer that arises by operation of the Act. This duty is independent of any duty an employer might owe his employee pursuant to an express or implied employment contract; it arises by operation of law.

Id. at 215.

Both *Wilson* and *Lukens Steel* held that the statute of limitations for personal injury claims should be used for suits under both 42 U.S.C. §§ 1981 and 1983. *Wilson v. Garcia* involved 42 U.S.C. § 1983. Section 1983 provides a federal remedy for violation of constitutional rights. The Court held that these claims were "more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." 471 U.S. at 277. After stressing that the Constitution protects the rights of "*persons*," the Court concluded that "[a] violation of that command is an injury to the individual rights of the person." *Id.* The Court in *Wilson* also explained that characterizing all § 1983 actions as involving "personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983." *Id.* at 279.

Similarly, the Court extended this ruling to suits brought under 42 U.S.C. § 1981 and held that Section 1981 involves claims of "personal injury." *See Good-*

man v. Lukens Steel, 482 U.S. 656. *Lukens Steel* is of particular relevance here because the plaintiff apparently brought the same racial discrimination claims under *both* Title VII and 42 U.S.C. § 1981. Some of the Title VII claims involved "disparate impact," which cannot be brought under § 1981. But as to claims of "disparate treatment" (i.e., intentional) discrimination:

> The District Court proceeded to find that the company had violated Title VII in several significant respects, including the discharge of employees during their probationary period, the toleration of racial harassment by employees, initial job assignments, promotions and decisions on incentive pay. The court also found that *in these identical ways the company had also violated § 1981* . . .
>
> Similarly, the Unions were found to have discriminated on racial grounds *in violation of both Title VII and § 1981 in certain ways*: failing to challenge discriminatory discharges of probationary employees; failure and refusal to assert racial discrimination as a ground for grievances; and toleration and tacit encouragement of racial discrimination.

482 U.S. at 664-65 (emphasis added). Thus, the substantive § 1981 and Title VII issues were seen to be identical.[3]

---

[3] As argued more fully below, the overwhelming weight of authority recognizes that the same substantive standards apply to disparate treatment suits brought under Title VII and § 1981. Indeed, "[i]t is quite common for an employment discrimination plaintiff to bring his action under both § 1981 and Title VII." Comment, *Arbitral Deference and the Right to Make and Enforce Contracts under 42 U.S.C. § 1981*, 82 Nw. U.L. Rev. 109, 112 (1987).

On the limitations period issue, even though Section 1981, by its terms, is premised upon the denial of the right "to make and enforce contracts" as is enjoyed by white citizens, the Court rejected the argument that Section 1981 claims are essentially contractual" and not personal. Despite Section 1981's reference to contract rights, the court declined to apply the longer limitations period applicable to contract claims:

> Section 1981 has a much broader focus than contractual rights. . . . Its heading was and is "Equal rights under the law" and is contained in a chapter entitled "Civil Rights." Insofar as it deals with contracts, it declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds. The provision asserts, in effect, that competence and capacity to contract shall not depend upon race. *It is thus part of a federal law barring racial discrimination, which, as the Court of Appeals said, is a fundamental injury to the individual rights of a person.* . . . That § 1981 has far-reaching economic consequences does not change this conclusion, since the impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference. The Court of Appeals was correct in selecting the Pennsylvania 2-year limitations period governing personal injury actions.

482 U.S. at 661-62 (emphasis added).[4]

---

[4] With respect to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612, Justice Marshall's unanimous decision stated:

> An action to redress racial discrimination may also be likened to an action for defamation or intentional inflic-

The same reasoning applies equally to claims brought under Title VII. As Justice O'Connor has explained: "[l]ike the common law of torts," the statutory employment "tort" created by Title VII has the purposes of "deter[ring] conduct which has been identified as contrary to public policy and harmful to society as a whole," and making whole the victims of employment discrimination. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1798 (1989) (O'Connor, J., concurring).

Thus, insofar as Title VII and Sections 1981 and 1983 provide causes of action for personal injury, monetary remedies under all those statutes should be exempt under Section 104(a)(2) of the Internal Revenue Code.

Indeed, as we now show, this and other courts have recognized that the substantive discrimination claims under Title VII are of the same personal nature as employment discrimination claims brought under 42 U.S.C. §§ 1981 and 1983. Both involve a duty owed by the employer to employees that "is independent of any duty an employer might owe his employee pursuant to an express or implied employment contract; it arises by operation of law." *Byrne v. Commissioner*, 883 F.2d 211, 215 (3d Cir. 1989).[5]

---

tion of emotional distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination may be treated as a dignitary tort."

Curtis v. Loether, 415 U.S. 189, 195 n.9 (1974) (citation omitted). *See also Davis v. Passman*, 442 U.S. 228, 235 n.10 (1979) (the right to be free from unreasonable gender discrimination is a personal right).

[5] The Solicitor General argues that "the existence of the respondents' employment contracts underlies their claims for wages", in that their claim for lost wages is based on "a condition of that contract implied in law." Brief for the United States at 23. The government's position here is a replay of the contract-based arguments rejected in *Lukens Steel*, where the cause of action was held to involve claims for personal injury notwithstanding the fact that the denial of the right to contract is the gravamen of a Section 1981 claim.

Additionally, even if the monetary claims here involve back pay—a point disputed by the respondent—several courts have ruled, that "to determine whether damages received by a taxpayer were paid on account of personal injuries, courts must look to the *nature of the claim* and not to the consequences that result from the injury." *Pistillo v. Commissioner*, 912 F.2d at 148-49, and cases cited. As the court below correctly stated, it is the nature of the injury and not "whether the consequences of the injury resulted in an award of . . . damages for back pay" which is determinative. *Burke v. United States*, 929 F.2d at 1121.

B. Like Sections 1981 and 1983, Title VII Claims Involve Personal Injury Actions Exempt From the I.R.C.

There can be no serious argument that the substantive protections of Title VII and 42 U.S.C. § 1981 are not of the same personal nature. Thus, the government cannot brush off *Lukens Steel* as "shed[ing] no light" on this case. *See* Brief for the United States at 29.

Indeed, the government's argument here is undercut by its argument in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In *Johnson*, the Solicitor General explained the relationship between Title VII and Section 1981:

> Title VII offers the aggrieved individual special assistance—e.g., investigations, conciliation machinery, legal counsel, waiver of court costs, and attorneys' fees—unavailable under Section 1981. But for individuals alleging that employers covered by Title VII have discriminated against

> them on the basis of race, *the substantive protections of the two statutes are quite similar.*

Brief for the United States as *Amicus Curiae*, in *Johnson v. Railway Express Agency, Inc.*, *supra*, at 13 (emphasis added). The government's *Johnson* brief further explained: "As we have shown above, . . . claims of racially discriminatory employment practices under Section 1981 and Title VII *are essentially equivalent in substance.*" *Id.* at 21.

That position has been adopted universally by the courts, and both this Court and the Solicitor General have determined that Section 1981 will be enforced by applying Title VII's burden of proof scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and related cases. For example, in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2377-78 (1989)—a suit brought under Section 1981—the majority opinion stated:

> We have developed, *in analogous areas of civil rights law*, in a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue of whether the defendant intentionally discriminated against the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We agree with the Court of Appeals that this scheme of proof, structured as a "sensible, orderly way to evaluate the evidence as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), *should apply to claims of racial discrimination under § 1981.*[6]

[6] On this point, the majority opinion agreed with the Brief for the United States in *Patterson v. McLean Credit Union.* There, the Solicitor General cited *Lukens Steel* to show that proof of discriminatory purpose is required under Section 1981. The brief then argued that "[a]s in actions under Title VII," the same burden of proof scheme should be used for Section 1981 suits. Br. for the United States at 23-24 in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

Similarly, Justice Brennan's dissenting opinion in *Patterson* applied this same line of Title VII precedent in determining that the district court's jury instruction on the plaintiff's promotion claim was "inconsistent with the scheme of proof we have carefully designed in analogous [Title VII] cases" for deciding whether the defendant had committed intentional discrimination. 109 S. Ct. at 2393. As Justice Brennan stated:

> *There is no reason why this scheme of proof*, carefully structured as a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), *should not apply to claims of racial discrimination under § 1981. Indeed, the Court of Appeals held below that "[t]he disparate treatment proof scheme developed for Title VII actions in McDonnell Douglas Corp. v. Green and its progeny may properly be transposed as here, to the jury trial of a § 1981 claim.*"

109 S. Ct. at 2393 (emphasis added). The dissenting opinion then applied these Title VII standards to determine that the majority had improperly upheld the jury instruction.[7]

[7] *See also New York Transit Auth. v. Beazer*, 440 U.S. 568, 583 n.24 (1979) ("Moreover, our treatment of the Title VII claim also disposes of the § 1981 claim without need of a remand.").

Like this Court, numerous courts have ruled that the causes of action for employment discrimination in Title VII and Sections 1981 and 1983 are virtually identical. *See e.g., Gairola v. Department of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985) ("Under Title VII and either § 1981 or § 1983, the elements of the required prima facie case are the same), and cases cited; *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983) (§§ 1981 and 1983 claims "require the same elements of proof as a Title VII action"), *cert. denied*, 469 U.S. 892 (1984); *Huebschen v. Department of Health & Social Servs.*, 716 F.2d 1167, 1170 (7th Cir. 1983), *quoting Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982) ("when § 1983 is used as a parallel remedy with Title VII in a discrimination suit, the elements of the substantive cause of action are the same under both statutes.").[8] And as noted previously, plaintiffs commonly allege that the same conduct constitutes violations of both Title VII and § 1981.[9]

---

[8] Numerous other appellate cases hold that when "the plaintiff predicates liability under Title VII under disparate treatment, the legal elements of the claim are identical to those of a claim under § 1981." *Lincoln v. Board of Regents of the Univ. Sys. of Ga.*, 697 F.2d 928, 935 n.6 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983), and cases cited. *Accord Lewis v. Central Piedmont Community College*, 689 F.2d 1207, 1209 n.3 (4th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983), and cases cited; *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980) ("When section 1981 is used as a parallel basis for relief with section 706 of Title VII against disparate treatment in employment, its elements appear *to be identical to those of section 706.*").

[9] "Disregarding questions of scope and of coverage, jurisdiction, and procedure . . . proof considerations—including burdens of proof, the elements of a prima facie case, and the theories of discrimination—have traditionally been treated as

C. Potential Substantive Conflicts Between Title VII and Section 1981 Have Been Resolved in Favor of the Substantive Requirements and Protections of Title VII

The decisions previously discussed involved claims of disparate treatment where there was no serious dispute that the same substantive standards applied to Title VII and Section 1981 disparate treatment claims. Of particular relevance, in addition, are cases where plaintiffs seized upon language differences between the two statutes to argue that Section 1981 provides more substantive protections than Title VII.

There have been several instances in which asserted substantive conflicts with Title VII have been rejected and Title VII's provisions consistently have been found controlling. Courts thus have been reluctant to find violations under Section 1981 that would invalidate employer practices found permissible under Title VII.

The legislative enactments of Congress "have long evinced a general intent to accord *parallel* or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7 (1974) (emphasis added), specifically citing to 42 U.S.C. § 1981.[10] Thus, while it is true that courts have found that Section 1981 was not preempted by

---

similar whether an action is brought under Title VII or under one of the earlier civil rights acts. This is true in both the individual case and other class action." Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1817 as Remedies for Employment Discrimination*, 50 S. Cal. L. Rev. 961, 1017 (1977).

[10] *Accord Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 623-24 (8th Cir. 1972).

Title VII,[11] such decisions usually have stressed that, unlike here, there was no "specific area of irreconcilable conflict between the laws" presented in those cases.[12] Accordingly, the decisional law demonstrates that the standard of a claim against a private party under 42 U.S.C. § 1981 is in essence that applied in a suit under Title VII, and that "decisions under Title VII cases . . . apply equally to actions brought under the century old Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983." *Shield Club v. City of Cleveland*, 13 Fair Empl. Prac. Cas. (BNA) 533 (N.D. Ohio 1974).[13]

In particular, the courts rejected arguments that the special protections given bona fide seniority systems by Section 703(h) of Title VII did not exist under Section 1981 because similar language was missing from the latter statute.[14] In *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), the plaintiff challenged the employer's "last hired, first fired" seniority system for brick layers. The district court held that the seniority system, which had its genesis in a period of racial discrimination, violated Section 1981 and was not *bona fide* under Title VII. 502 F.2d at 1314, 1317. Although the Seventh Circuit agreed that the employer had violated Section 1981 by its pre-Title VII hiring discrimination, it reversed the district court's holding that the seniority system was invalid because it perpetuated the effects of past discrimination.

The court's rejection of the seniority allegation was based upon Section 703(h) of Title VII and its legislative history. 502 F.2d at 1317-20. In its holding, the court discussed the relationship between the two statutes:

> Title VII and section 1981 are "parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). Consequently, in fashioning a substantive body of law under Section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction.

502 F.2d at 1316. The court then stated that "[h]aving passed scrutiny under the substantive require-

---

[11] *See, e.g., Sanders v. Dobbs House, Inc.*, 431 F.2d 1097, 1100-01 (5th Cir. 1970) *reh. denied*, 431 F.2d 1097, *cert. denied*, 401 U.S. 948 (1971); and *Johnson v. City of Cincinnati*, 450 F.2d 796, 797-99 (6th Cir. 1971).

[12] *See Sanders*, and *Johnson*, *supra* note 11.

[13] See also *Terrell v. United States Pipe & Foundry Co.*, 6 Fair Empl. Prac. Cas. (BNA) 1027, 1028 (N.D. Ala. 1973) (Title VII definitions used as a guide to determine the proper parties in action under Section 1981); *Espinoza v. Farah Mfg. Co.*, 11 Fair Empl. Prac. Cas. (BNA) 696 (W.D. Tex. 1975) (Section 1981 claim dismissed because Title VII holdings on same subject matter found no violation); *Patterson v. American Tobacco Co.*, 535 F.2d, 257, 270 (4th Cir. 1976) (in order to avoid conflict with Title VII, "bumping" remedy was held not available under Section 1981), *cert. denied*, 429 U.S. 920 (1976).

[14] § 703(h) reads in pertinent part:

> Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

ments of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981." 502 F.2d at 1320 n.4.

Similarly, in *Hinton v. Lee Way Motor Freight, Inc.*, 412 F. Supp. 625, 628-29 (W.D. Okla. 1975), the court rejected claims that Lee Way had violated 42 U.S.C. § 1981 by its contractual seniority system. Even though no Title VII allegations were asserted, and the suit was brought *exclusively* under Section 1981, the court applied the seniority protections of Title VII in dismissing the suit, noting that Title VII provided "modern legislative history which is directly in point." *Id.* at 628. After quoting the language in the *Waters* decision, cited above, the court then noted:

> The above statement appears appropriate for consideration in the instant case wherein Plaintiffs proceed only under 42 U.S.C. § 1981, possibly attempting to avoid the congressional dictates of Title VII. *Courts must apply all principles of law applicable to a given issue and may not narrowly construe a particular statute to the exclusion of an overlapping statute on the same issue.* The principles contained in Title VII are applicable to Plaintiff's case herein and are considered by the Court in deciding same.

412 F. Supp. at 628 (emphasis added). *Accord Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), *reh'g denied*, 434 U.S. 881 (1977); *Patterson v. American Tobacco Co.*, *supra* at 270; *cf. Driscoll v. Jefferson*, 11 Fair Empl. Prac. Cas. (BNA) 308 (E.D. Mich. 1975) (oral opinion).

Accordingly, the cases appear to be unanimous that, with respect to Section 1981, the substantive requirements of that earlier legislation must be construed to harmonize with Title VII definitions of discrimination, even where protective language (such as Section 703(h)) has not specifically been provided. In order to avoid conflict in the interpretation of "parallel" federal legislation, Title VII has been interpreted to be the latest and paramount expression of Congressional intent.[15]

The courts thus have realized that to apply different standards under Title VII and Section 1981 "would make little sense." *Setser v. Novak Investment Company*, 657 F.2d 962, 967 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981). The courts should "look to the principles of law created under Title VII for direction" in order to avoid substantive conflicts with Section 1981. *Id.*, at 967.

Given the overwhelming weight of authority equating the substantive provisions of Title VII and Section 1981, Title VII violations should be construed as causing "a fundamental injury to the individual

---

[15] Relying on these decisions, other courts ruled that Title VII's substantive protections of bona fide seniority systems also apply to Executive Order 11,246, another nondiscrimination scheme that does not have the specific seniority protections of Section 703(h) of Title VII. *See United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); and *United States v. East Tex. Motor Freight Sys.*, 564 F.2d 179, 185 (5th Cir. 1977). In *East Texas* the court relied in part on this Court's remand of the Section 1981 claims in *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *cert. granted, decision vacated, and case remanded*, 431 U.S. 951 (1977), for reconsideration in light of the Title VII seniority holdings in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

rights of a person. . . ." *Goodman v. Lukens Steel*, 482 U.S. at 661-62. Title VII monetary settlements thus are exempt from taxable income under Section 104(a)(2) of the I.R.C.

CONCLUSION

For the reasons stated, the *amicus curiae* EEAC urges the Court to affirm the decision below and hold that monetary settlements under Title VII are on account of "personal injuries" and thus exempt from taxable income under Section 104(a)(2) of the Internal Revenue Code.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

December 20, 1991

* Counsel of Record